

2011 IL App (1st) 100055-U

FIRST DIVISION
FILED: December 27, 2011

No. 1-10-0055

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 03 CR 2264
)	
JAMES MARTIN,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Karnezis and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of defendant's post-conviction petition affirmed where he failed to raise an arguable claim of ineffective assistance of trial or appellate counsel.

¶ 2 Defendant James Martin appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2008). He contends that he stated an arguable claim of ineffective assistance of appellate counsel which warranted further proceedings under the Act.

¶ 3 The record shows that a jury found defendant guilty of first degree murder based on evidence that he fired a gun from a moving car into a crowd of people, striking the victim, Maurice Mottley. Defendant was sentenced to 30 years' imprisonment on his conviction, and this court affirmed that judgment on direct appeal. *People v. Martin*, No. 1-06-0810, order at 24 (2008) (unpublished order under Supreme Court Rule 23).

¶ 4 On September 2, 2009, defendant filed a *pro se* post-conviction petition alleging, *inter alia*, ineffective assistance of appellate counsel for failing to raise on direct appeal trial counsel's failure to interview or call as witnesses certain individuals he claimed would have bolstered his trial theory that he acted under an unreasonable belief of self-defense. The circuit court summarily dismissed defendant's petition as frivolous and patently without merit. In its written order, the court noted that defendant failed to make the requisite factual showing to support his claim of ineffective assistance because he did not attach affidavits from any of the potential witnesses and did not establish that their proposed testimony would have substantially affected the outcome of the trial. Defendant now challenges that ruling on appeal, and our review of the dismissal of his petition is *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 5 Defendant contends that he stated an arguable claim of ineffective assistance of appellate counsel for his failure to raise on direct appeal trial counsel's ineffective representation for failing to call one of three witnesses, Antoine Nobles, to bolster his otherwise uncorroborated defense. The State initially responds that this claim is barred by waiver.

¶ 6 The record shows that defendant filed a *pro se* post-trial motion raising the effectiveness of trial counsel for his failure to call Nobles at trial. Alternate counsel was appointed to represent him; at the evidentiary hearing which followed, testimony, as pertinent to this appeal, was presented from Nobles and defendant's trial counsel.

¶ 7 Nobles testified that on the night of the shooting, he saw 10 or 11 people charge toward defendant, screaming, but that he did not tell this to police. Prior to trial, Nobles met with defendant's trial counsel, who told him that he would be called at trial, but he was not. Nobles acknowledged that he told counsel that none of the individuals who charged defendant that night had a weapon and that the victim was the only one who got near defendant's car.

¶ 8 Trial counsel testified that he met with Noble on a number of occasions and decided not to call him because of credibility concerns, including contradictions with defendant's testimony and the potentially damaging testimony that none of the individuals had weapons. The trial court denied defendant's motion, noting that trial counsel's decisions were based on reasonable trial strategy.

¶ 9 Based on this record, it is clear that the issue of trial counsel's ineffectiveness could have been raised on direct appeal, and since it was not, the issue may be deemed waived. *People v. Enis*, 194 Ill. 2d 361, 375 (2000). In his reply brief, defendant claims that waiver is inapplicable because the alleged waiver stems from the incompetence of appellate counsel. *People v. Haynes*, 192 Ill. 2d 437, 476 (2000).

¶ 10 We initially observe that defendant may not circumvent waiver by simply alleging ineffective assistance of appellate counsel. *People v. Flores*, 153 Ill. 2d 264, 277 (1992). Notwithstanding, such a claim is evaluated under the two-pronged *Strickland* test, and a defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts that demonstrate that such a failure was objectively unreasonable and that counsel's decision prejudiced him. *People v. Enis*, 194 Ill. 2d 361, 377 (2000). If the underlying issue is not meritorious, defendant did not suffer prejudice (*Enis*, 194 Ill. 2d at 377), and we need not determine whether counsel's performance constituted less than reasonable assistance (*Flores*, 153 Ill. 2d at 284).

¶ 11 Here, we find that defendant has not demonstrated prejudice resulting from trial counsel's failure to call Nobles as a trial witness. The testimony of both Nobles and trial counsel at the post-trial hearing supports counsel's strategic decision not to call Nobles at trial. The representations made by Nobles at that hearing show that testimony to that effect would not exculpate defendant or bolster his self-defense claim; and, regarding the lack of weapons in the crowd, his testimony would have likely detracted from a self-defense claim. In fact, trial counsel specifically referred to this potentially damaging testimony as one reason why he did not call Nobles as a witness. The record thus supports the conclusion that counsel's decision was based on a reasonable trial strategy, and defendant has not supported his contrary claim with an affidavit from Nobles or any other witnesses, or other supporting evidence, showing otherwise. *People v. Dean*, 226 Ill. App. 3d 465, 468 (1992).

¶ 12 Accordingly, we conclude that defendant's underlying claim is without merit and that his ineffective assistance of appellate counsel claim fails for lack of prejudice. *Enis*, 194 Ill. 2d at 382. We, therefore, affirm the summary dismissal of defendant's *pro se* post-conviction petition as frivolous and patently without merit. *Hodges*, 234 Ill. 2d at 9.

¶ 13 Affirmed.